

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs December 19, 2005

ROBERT CLARENCE PAYNE v. JANET PELMORE, M.D., ET AL.

Appeal from the Circuit Court for Davidson County
No. 03C-1528 Hamilton V. Gayden, Jr., Judge

No. M2004-02281-COA-R3-CV - Filed February 28, 2006

Inmate filed a medical malpractice, negligence, and deliberate indifference claim against health care providers and administrative personnel at the Middle Tennessee Correctional Complex, the South Central Correctional Facility, and the Tennessee Department of Correction regarding the treatment of his Hepatitis C condition. The trial court granted Defendants' motions for summary judgment, dismissing all of inmate's claims. Inmate appealed the decision of trial court. The Court affirms the judgment of the trial court in all respects.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

WILLIAM B. CAIN, J., delivered the opinion of the court, in which PATRICIA J. COTTRELL and FRANK G. CLEMENT, JR., JJ., joined.

Robert C. Payne, Nashville, Tennessee, pro se.

Jerry O. Potter and Stephen G. Smith, Memphis, Tennessee, for the appellees, Correctional Medical Services, Janet Pelmore, M.D., Don Webb and Joy Fowler.

George A. Dean, Nashville, Tennessee, for the appellee, Robert Coble, M.D.

James I. Pentecost and Brandon O. Gibson, Jackson, Tennessee, for the appellee, John Crunk.

OPINION

In February 2002, Robert Clarence Payne (Payne) was incarcerated at the Middle Tennessee Correctional Complex (MTCC) located in Nashville, Tennessee. In June 2002, he was transferred to the South Central Correctional Facility (SCCF) in Clifton, Tennessee. On September 28, 2003, Payne was released from the custody of the Tennessee Department of Corrections (TDOC) on parole, however, on October 3, 2003, Payne was re-arrested on charges of criminal homicide and re-

incarcerated at the MTCC. Payne is presently an inmate in the custody of the TDOC and incarcerated at the MTCC.

On May 28, 2003, Payne filed a medical malpractice, negligence, and deliberate indifference claim against Janet Pelmore, M.D. (Dr. Pelmore), a physician at the MTCC, Robert Coble, M.D. (Dr. Coble), a physician at the SCCF, Joy Fowler (Fowler), a nurse at the MTCC, Don Webb (Webb), Health Administrator at the MTCC, Correctional Medical Services (CMS), a private corporation who contracted with the TDOC to provide medical care and treatment to prison inmates, John Crunk (Crunk), Health Administrator at the SCCF, Howard Cook (Cook), Assistant Commissioner of the TDOC, Donal Campbell (Campbell), Former Commissioner of the TDOC, and Quenton White (White), Commissioner of the TDOC, in Davidson County Circuit Court. Payne asserted that while he was an inmate in the custody of the TDOC, he sought medical treatment for Hepatitis C from May 2002 until March 20, 2003, at both the MTCC and the SCCF, and that he was denied adequate treatment to cure the defects of his Hepatitis C condition.

Defendants Campbell, White, and Cook filed a motion to dismiss on July 18, 2003, which the court granted on October 16, 2003. On March 8, 2004, Payne filed a motion for summary judgment. Defendant Crunk filed a response to Payne's motion and a cross-motion for summary judgment on March 16, 2004. On April 5, 2004, Defendants Dr. Pelmore, Fowler, Webb, and CMS filed a motion for summary judgment. Dr. Coble also filed a motion for summary judgment on April 12, 2004.

On May 10, 2004, the court ordered that oral argument be held at the Riverbend Maximum Security Institution on June 11, 2004, in order to allow Payne to personally attend and present his arguments to the court regarding the motions for summary judgment. On June 21, 2004, the trial court granted Defendants' motions on all claims, finding that Defendants' experts' affidavits exonerated Defendants as to the medical malpractice and negligence claims and that Payne failed to state a claim for deliberate indifference.

Payne filed a timely notice of appeal. On appeal, Payne asserts that the trial court erred in (1) granting Defendants' motions for summary judgment as to his medical malpractice and negligence claims; and, (2) granting Defendants' motions for summary judgment as to his deliberate indifference claims.

In a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party and draw all reasonable inferences in the nonmoving party's favor. *Byrd v. Hall*, 847 S.W.2d 208, 210-11 (Tenn.1993). Summary judgment is appropriate only when the moving party can demonstrate that no genuine issue of material fact exists and that he or she is entitled to judgment as a matter of law. Tenn.R.Civ.P. 56.04. Because summary judgments present purely questions of law, our review of the record is *de novo* with no presumption of correctness below. *Byrd*, 847 S.W.2d at 210.

A defendant seeking summary judgment in a medical malpractice action may meet its burden by demonstrating that the plaintiff will be unable to prove an essential element of his or her case, *Byrd*, 847 S.W.2d at 213, because the inability to prove an essential element of a claim necessarily renders all other facts immaterial. *Alexander v. Memphis Individual Practice Ass'n*, 870 S.W.2d 278, 280 (Tenn.1993). Once a defendant has negated an essential element of the plaintiff's claim, the plaintiff may not rest on his or her pleading but must respond with appropriate evidentiary materials demonstrating that there is a genuine issue of fact for trial. *Fowler v. Happy Goodman Family*, 575 S.W.2d 496, 498 (Tenn.1978).

The burden of proof a plaintiff must meet in order to maintain a cause of action for medical malpractice is outlined in Tennessee Code Annotated section 29-26-115(a), which states:

(a) In a malpractice action, the claimant shall have the burden of proving by evidence as provided by subsection (b):

(1) The recognized standard of acceptable professional practice in the profession and the specialty thereof, if any, that the defendant practices in the community in which the defendant practices or in a similar community at the time the alleged injury or wrongful action occurred;

(2) That the defendant acted with less than or failed to act with ordinary and reasonable care in accordance with such standard; and

(3) As a proximate result of the defendant's negligent act or omission, the plaintiff suffered injuries which would not otherwise have occurred.

Tenn. Code Ann. § 29-26-115(a).

In this case, Defendants Dr. Pelmore, Webb, Fowler, and CMS filed a motion for summary judgment on April 5, 2004, attaching the affidavit of Leslie Collins, M.D. Dr. Collins stated in part:

[I]n the course of my work as a doctor at the Middle Tennessee Correctional Complex, I have had the opportunity to examine and treat Robert Payne. Mr. Payne has Hepatitis C, which I have been monitoring by physical examination as well as laboratory blood tests. His blood work has been stable. An ultrasound was performed in October 2003, which showed a normal liver, duct system and gallbladder. He was referred to Dr. Dan Gremillion, a Gastroenterologist. Dr. Gremillion saw Mr. Payne on January 22, 2004. Dr. Gremillion recommended, and I approved, the following course of treatment:

1. Viral load and hepatitis C genotype (lab work)
2. Vaccinate with Hepatitis A and B shots

3. High Fiber diet
4. Follow up after the above to determine if liver biopsy needed
5. Treatment of gastroesophageal reflux disease and irritable bowel syndrome
6. Referral to psychiatrist to be placed on anti-depressant

Based upon my training and experience, I am familiar with the standard of care as it relates to the monitoring and treatment of patients with Hepatitis C. Based upon my personal knowledge as to the treatment that I and others have provided to Mr. Payne, I am of the opinion that I and the other physicians associated with the Correctional Medical Services have complied in all respects with the appropriate standard of care and that Mr. Payne has not suffered any injury as a result of anything that was done or not done to him by either myself or other doctors associated with the Correctional Medical Services.

Defendants Crunk and Dr. Coble also filed motions for summary judgment on March 16, 2004, and April 12, 2004. Dr. Coble attached the affidavit of Donald Boatright, M.D., which stated in part:

2. I have for many years worked as the Medical Director for the Riverbend Maximum Security Institution and for the Women's Prison in Nashville. I also provided internal medicine consultations at the Deberry Special Needs Facility. I am, as a result, very familiar with the standard of acceptable professional practice for a physician in the area of Middle Tennessee, particularly as it relates to the care and treatment of incarcerated individuals.
3. In my opinion, within a reasonable degree of medical certainty, Dr. Coble and the other health care providers complied with the standard of acceptable professional practice in their care and treatment of this plaintiff.
4. Within a reasonable degree of medical certainty, nothing that Dr. Coble or any of the other health care providers did or did not do caused the plaintiff any harm which would not otherwise have occurred to this plaintiff.

The affidavits of Drs. Collins and Boatright affirmatively negated essential elements of Payne's medical malpractice and negligence claim against Defendants and shifted the burden to Payne to rebut Defendants' expert proof. It is well established that expert testimony is required to establish the standard of care, a deviation from the standard of care, and proximate causation in all medical malpractice actions except those in which the alleged negligence is within "the common knowledge of laymen." *Phelps v. Vanderbilt Univ.*, 520 S.W.2d 353, 357 (Tenn.Ct.App.1974). Only the most obvious forms of negligence fall within the common knowledge exception. *Ayers v. Rutherford Hosp., Inc.*, 689 S.W.2d 155, 160 (Tenn.Ct.App.1984).

The Tennessee Supreme Court has held that "in those malpractice actions wherein expert testimony is required to establish negligence and proximate cause, affidavits by medical doctors

which clearly and completely refute plaintiff's contention afford a proper basis for dismissal of the action on summary judgment, in the absence of proper responsive proof by affidavit or otherwise." *Bowman v. Henard*, 547 S.W.2d 527, 531 (Tenn.1977). After hearing oral argument on the motions, the trial court granted Defendants' motions for summary judgment as to Payne's medical malpractice claims against the medical Defendants and negligence claims against the administrative Defendants. The court stated in part:

This cause came to be heard on the 11th day of June, 2004 at Maximum Security Prison on Centennial Boulevard.

The Court heard argument from the plaintiff, Robert Clarence Payne, on his motion for summary judgment. The Court heard argument from counsel for the defendants, Dr. Robert Coble, John Crunk, Janet Pelmore, M.D., Don Webb, Joy Fowler, and Correctional Medical Services, Inc.

The Court denies plaintiff's motion for summary judgment. The Court grants summary judgment to the defendants, Dr. Robert Coble, John Crunk, Janet Pelmore, M.D., Don Webb, Joy Fowler and Correctional Medical Services, Inc.

The complaint filed by the plaintiff alleges medical malpractice, negligence, and failure to treat in violation of plaintiff's civil rights. The complaint prays for monetary damages as well as injunctive relief and prays for other relief.

The Court has reviewed the filed, considered the affidavits of the experts, especially Dr. Donald Boatright and Dr. Leslie Collins. There are no expert affidavits filed by plaintiff. In his argument, plaintiff relies on defendant's expert affidavits of Dr. Leslie Collins which he is entitled to do for the purposes of summary judgment.

However, on the issue of medical malpractice and negligence the Court is of the opinion that the experts exonerate the defendants who would be chargeable with medical malpractice. The affidavits also exonerate the administrative defendants in that the affidavits reflect that the plaintiff was given proper care under the standard of care in existence at that time.

Because the alleged malpractice in this case is not within "the common knowledge of laymen" and because Payne failed to submit any expert testimony rebutting the affidavits of Drs. Collins and Boatright, the trial court properly granted Defendants' motions for summary judgment on Payne's medical malpractice and negligence claims.

Payne also asserts that the trial court erred in dismissing his claims against Defendants for deliberate indifference to serious medical needs in violation of the Eighth Amendment. In order to establish a claim for deliberate indifference, the plaintiff has the burden of showing both a subjective and an objective element. *Farmer v. Brennan*, 511 U.S. 825, 834, 114 S.Ct. 1970, 1977, 128 L.Ed.2d 811 (1994). The subjective condition requires that the prison officials act with deliberate indifference such that their conduct rises to the level of criminal recklessness. *Brooks v. Celeste*, 39 F.3d 125, 128 (6th Cir. 1994). The condition is met when the prison official "knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from

which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.” *Farmer*, 511 U.S. at 837.

The objective element requires that the deprivation of medical attention be “sufficiently serious.” *Farmer*, 511 U.S. at 834. “A medical need is serious if it ‘is one that has been diagnosed by a physician as mandating treatment or one that is so obvious even a lay person would easily recognize the necessity for a doctor’s attention.’” *Ramos v. Lamm*, 639 F.2d 559, 575 (10th Cir.) (quoting *Laaman v. Helgemoe*, 437 F.Supp. 269, 311 (D.N.H.1977)).

The trial court dismissed Payne’s deliberate indifference claims based on the inadequacy of Payne’s complaint and the arguments presented by the parties at the June 11, 2004, hearing. The court stated in part:

The Court is also of the opinion there are no sufficient facts to show the administrative (no medical) defendants delayed plaintiff’s treatment for hepatitis C. Thus, his civil rights were not violated.

The plaintiff also asked for injunctive relief requiring the State of Tennessee or its medical assignees, to treat him for hepatitis C. The Court has previously ordered examinations of the plaintiff and pressed the State of Tennessee to make sure the plaintiff was receiving the best possible treatment.

The Court has also reviewed the file and is confident that plaintiff is receiving the best possible treatment for hepatitis C through Dr. Dan Germillion.

Therefore, the Court grants the motions for summary judgment filed by the defendants.

The record is void of any evidence of deliberate indifference on the part of Defendants. At most, Payne disagrees with Defendants’ course of treatment, alleging that such treatment was inadequate and medically negligent. However, inadequate medical treatment alone is insufficient to state a claim under the Eighth Amendment. *Estelle v. Gamble*, 429 U.S. 97, 105-106, 97 S.Ct. 285, 291 (1976). Furthermore, a mere difference of opinion between the prison’s medical staff and the inmate as to the diagnosis or treatment of that inmate, does not support a claim of cruel and unusual punishment. *Ramos*, 639 F.2d at 575.

The record does show, however, that Payne was treated by Dr. Pelmore, Dr. Collins, and Dr. Coble and was sent to a specialist, Dr. Dan Germillion, who along with Dr. Collins, developed a course of treatment specifically for Payne’s Hepatitis C condition. The affidavits of Defendants’ experts, Drs. Collins and Boatright, further support Defendants’ contention that their conduct was well within the standard of professional practice in the relevant community. The Court would further note that medical malpractice is not a constitutional violation merely because the plaintiff is a prisoner. *Estelle*, 429 U.S. at 106.

Therefore, the decision of the trial court is affirmed in all respects. Costs of appeal are assessed against Appellant, Robert Clarence Payne.

WILLIAM B. CAIN, JUDGE